

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ABBOTT CARDIOVASCULAR SYSTEMS INC.
and ABBOTT LABORATORIES INC.,

Plaintiffs,

V.

MEDTRONIC VASCULAR, INC. and
MEDTRONIC USA, INC.,

Defendants.

C. A. No. 98-80 (SLR)
(Consolidated with C.A. No. 98-314
(SLR) and C.A. No. 98-316 (SLR))

REDACTED

**ABBOTT'S RESPONSE TO MEDTRONIC'S PROPOSED OBJECTIONS TO EVIDENCE
CITED IN PLAINTIFFS' REPLY BRIEF**

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December 11, 2007

In the event that the Court grants Medtronic's Motion for Leave (D.I. 809) and considers Medtronic's proposed evidentiary objections, the following are Abbott's responses. For the reasons explained below, Medtronic's objections should be overruled.

1. **Morgan Stanley, Hosp. Supplies & Medical Technology, *Implications of the CoStar II Failure: Another Blow to J&J*, May 7, 2007 (D.I. 726, Ex. 21)**

Medtronic Waived Its Objections

Abbott cited this same analyst report on June 29, 2007, in its opening brief (D.I. 727 at 9), and Medtronic made no objection. Indeed, rather than object in its opposition brief, Medtronic instead relied on this same report to show market share. (D.I. 781 at 8 n.6.) Moreover, Medtronic also relied on another Morgan Stanley report. (D.I. 781 at 19 n.14; D.I. 790, Ex. G.)

Response to Hearsay Objection

As a threshold matter, the market share projections are not only relevant for the truth of the matter asserted (i.e., that Abbott will, in fact, lose market share to Medtronic in the future if Medtronic's infringement does not cease), but also to show that investors *believe* that Medtronic will continue to take market share from Abbott, thus damaging Abbott's goodwill *regardless* of whether the projections turn out to be true.

Moreover, the Morgan Stanley report satisfies several exceptions to the hearsay rule, including Fed. R. Evid. 803(6) (business record exception), Fed. R. Evid. 803(17) (market report), and Fed. R. Evid. 807 (residual exception).

Response to Foundation Objection

Medtronic's foundation objection is misplaced. The Morgan Stanley report was written by professional analysts in Morgan Stanley's research department that cover the medical device businesses of Abbott, Boston Scientific, Johnson & Johnson, and Medtronic. (D.I. 726, Ex. 21 at 1.) Indeed, when it has suited its purposes, Medtronic itself has relied on Morgan Stanley reports

As explained above, the Morgan Stanley reports are prepared by professional and experienced industry analysts, as shown by the fact that Medtronic itself relies on them. Moreover, given the significant amount of past data on the U.S. stent market, Morgan Stanley's forecast of Abbott's and Medtronic's future market shares, based on its research of past and present conditions, is not unduly speculative.

[illegible]

3. **Morgan Stanley, Hosp. Supplies & Medical Technology, *Lau Patent Update: Noose Tightening on Medtronic*, July 1, 2007 (D.I. 781, Ex. G)**

Medtronic Waived Its Objections

Medtronic cited this very report in its opposition brief. (See D.I. 781 at 19 n.14.)

Response to Hearsay Objection

First, this report is relevant *regardless* of the truth of the matter asserted, since it shows the state of mind of investors, which is directly relevant to Abbott's loss of goodwill caused by Medtronic's infringement. Thus, the hearsay rule does not apply. Fed. R. Evid. 801(c).

Moreover, the Morgan Stanley report satisfies several exceptions to the hearsay rule, including Fed. R. Evid. 803(6) (business record exception), Fed. R. Evid. 803(17) (market report), and Fed. R. Evid. 807 (residual exception).

Response to Foundation Objection

Again, Medtronic's foundation objection is misplaced. The Morgan Stanley report was written by professional analysts in Morgan Stanley's research department that cover the medical device businesses of Abbott, Boston Scientific, Johnson & Johnson, and Medtronic. (D.I. 790, Ex. G at 1.) And Medtronic too has relied on Morgan Stanley reports, including this very report. (See, e.g., D.I. 781 at 8 n.8, 19 n.14; [REDACTED].)

As such, Morgan Stanley's analysts have a foundation to opine on whether the capital markets have discounted the possibility of an injunction. In any event, as explained above, Abbott is offering this document for a purpose that does not depend on the accuracy of the analysts' opinion, only that it was said, which in and of itself affects Abbott's goodwill.

Response to Speculation Objection

Again, as explained above, the Morgan Stanley analysts have more than adequate industry knowledge and expertise to draw conclusions on how the market is reacting to the possibility of an

injunction on the market---this is their job. Moreover, Abbott cited this report to show that Medtronic's infringement has a negative effect on investors' valuation of Abbott's business. This is true regardless of whether the analysts are correct.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. **Dr. John Ormiston, *Independent Comparison of Biomechanical Properties of Different Stents*, Auckland, New Zealand (D.I. 806, Ex. 30)**

Response to Authenticity Objection

This document is a slide presentation by Dr. John Ormiston at the 2003 TCT conference, which presents comparative data on flexibility and other characteristics of various stents, including Abbott's Vision and Medtronic's Driver. [REDACTED]

[REDACTED]

[REDACTED] A copy of this document can be found on the TCT's website at "<http://www.tctmd.com/>

csportal/appmanager/tctmd/main?_nfpb=true&_pageLabel=TCTMDContent&hdCon=837518.”¹

Under Fed. R. Evid. 901(a), the TCT’s website adequately authenticates this document. Moreover, Medtronic has not presented any evidence (or even asserted) that this document is not what Abbott claims it to be.

Response to Hearsay Objection

Abbott cited this evidence to rebut unsupported allegations [REDACTED]

[REDACTED] Contrary to these allegations, Dr. Ormiston presented scientific testing at the 2003 TCT conference that shows that, [REDACTED]

[REDACTED] (D.I. 806, Ex. 30) Under Fed. R. Evid. 803(18), Dr. Ormiston’s presentation constitutes a learned treatise admissible [REDACTED]. Indeed, presumably under this exception, Medtronic cites to numerous journal articles (*e.g.*, D.I. 781 at 25 n.16, 27), and even its own marketing brochure (D.I. 781 at 28; D.I. 789, Ex. A), none of which is any more reliable or authoritative than Dr. Ormiston’s presentation. Additionally, Dr. Ormiston’s presentation comes under the residual exception. *See* Fed. R. Evid. 807.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ A TCT website account is required to access the Ormiston presentation. Presumably, Medtronic, a regular participant and sponsor of the TCT conference, has an account.

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Dated: December 11, 2007

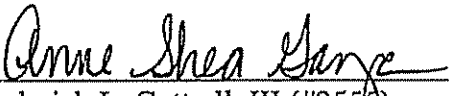

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EXHIBIT 1 REDACTED IN ITS ENTIRETY

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

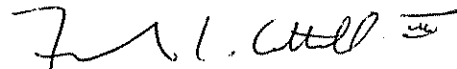
I hereby certify that on December 28, 2007, I caused to be served by hand delivery the foregoing document and electronically filed the same with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the following:

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